## REPORTS.

The opinion of the Court of Claims has not been published in any official or unofficial report. It is appended as Appendix "A".

The letter of the contracting officer of the Chicago Ordnance District dated 28 February 1956, which the Court of Claims holds denied the claim, and a letter of the legal officer of the Chicago Ordnance District dated 8 August 1957 stating that the earlier letter had denied the claim, are appended as Appendix "B". Neither letter has been published in any official or unofficial report.

## GROUNDS ON WHICH JURISDICTION IS INVOKED.

The judgment of the Court of Claims was decided on 14 January 1959 on motion of the United States to dismiss the case on the ground that it was barred by limitations and on the court's own motion, without notice and benefit of argument, on the ground that the petition did not state a cause of action.

A petition for rehearing filed on 13 February 1959 was denied on 8 April 1959.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1) within the time allowed by 28 U.S.C. § 2101(c) and Rule 22(3) of this Court.

The jurisdiction of the Court of Claims was invoked under 41 U.S.C. §§ 117(c) and 113(b) and under 28 U.S.C. §§ 1491 and 1494.

## QUESTIONS PRESENTED FOR REVIEW.

1.

Whether a request by a contracting agency to a sub-sub-subcontractor to proceed with its contract to manufacture 40 million bullet cores in 1942 when it would not

have done so otherwise because of the insolvency of the sub-subcontractor, alone or in conjunction with a promise that the United States guaranteed payment, complied with by the sub-sub-subcontractor, establishes privity of contract between the United States and the sub-sub-subcontractor and entitles the latter to maintain an action against the United States on a termination claim for damages which it could not recover from the sub-subcontractor by reason of its insolvency.

2.

Whether a letter from a contracting officer stating that he does not believe that the claimant has a valid claim but stating "if you still desire a conference after examination of the views expressed herein, such can be arranged" but without any further action on the part of the contracting officer is a finding or decision giving the claimant a right to appeal to the Court of Claims and causing the statute of limitations to start running on the right to appeal and on the claim.

3.

Whether petitioner has been deprived of administrative and judicial due process by the manner in which its claim has been handled with particular emphasis on the failure of the contracting officer to make findings or render an unequivocal decision appraising petitioner that it had to appeal to preserve its claim and the action of the Court of Claims in summarily dismissing the claim on the merits on the court's own motion without notice or argument other than that contained in the petition for rehearing.

4.

Whether the contracting agencies assumed the obligation to settle petitioner's claim by advising it that it had

a termination claim and instructing it where to file its claim and subsequently investigating and auditing the claim.

5.

Whether the United States is estopped to deny the claim and to raise the statute of limitations.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provision involved of course is the due process clause of the 5th Amendment to the Constitution of the United States—"No person shall be . . . deprived of . . . property, without due process of law."

The statutory provisions involved are Sections 3, 6, 7, 13, 17, 20, and 24 of the Contract Settlement Act of 1944 (41 U.S.C. §§ 103, 106, 107, 113, 117, 120 and 124) and 28 U.S.C. § 2501. The pertinent statutory provisions are set out verbatim as Appendix "C".

## REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED.

### A.

### The Court of Claims and the Contracting Agencies Have So Far Departed from the Accepted and Usual Course of Judicial and Administrative Proceedings as to Call for an Exercise of this Court's Power of Supervision.

#### 1.

#### The Court of Claims Decided the Case on the Merits Without Giving Petitioner An Opportunity to Be Heard on the Matter.

Plaintiff has never had a hearing on the question, Does the plaintiff's petition state a cause of action? The mo-

tion to dismiss did not challenge the cause of action. Consequently, it was assumed by plaintiff and its attorneys that the petition did state a cause of action and plaintiff's answer to the motion to dismiss naturally was written only to refute the contention that the claim was barred by limitations. No one denies the power and the duty of any court to dismiss an action when it is apparent that the plaintiff has no cause of action even though the defendant does not make the point. We do insist, however, that due process of law and ordinary courtesy to the attorneys who have appealed a case and whose names are linked forever with the opinion rendered by the court in its reports and whose present and historical professional standing is dependent on success in advocacy, should be given an opportunity to be heard on any issue raised by the court before it finally disposes of the case by an adverse ruling on the issue. We further suggest that a petition for rehearing without benefit of oral argument and after the court has already prejudiced itself does not give counsel a fair opportunity to argue the matter.

2.

**The Court of Claims Held This Suit Was Barred As An Appeal Although No Final Decision Was Ever Rendered by the Contracting Officer.**

"A cause or right of action accrues, so as to start the statute of limitations running, when the right to institute and maintain a suit arises, and not before." 54 C.J.S. 11. "In order to start limitations running, there must be a competent tribunal open for suit." 54 C.J.S. 16. "The statute of limitations does not begin to run until the party against whom it is asserted can resort to a remedy." 54 C.J.S. 39.

"As a general rule, where presentation of a claim to a county or other municipal body is a condition precedent

to the maintenance of an action, the statute of limitations commences to run fr[illegible] the date the claim is presented and rejected." 54 C.J.S. 209.

"Where, after the accrual of a cause of action, another cause of action arises for the benefit of the same person, the statute of limitations begins to run, as to the latter cause, at the time of its accrual." 54 C.J.S. 17.

If a contracting officer's decision is to be accorded finality it must be unequivocal and clear enough to appraise the contractor so that he can reasonably determine whether an appeal is necessary. *Allied Contractors, Inc. v. United States*, 129 C. Cls. 400 (1954).

In *Jacks*, (W.D. BCA No. 1343, 1947) 4 CCF Par. 60, 295, the Board held that although a contracting officer's final decision does not need to be in any particular form, it must be in such form as to clearly indicate that it is a final decision as to matters in dispute, and an appellant has a right to a formal written decision of the contracting officer, from which an appeal can be taken.

*Continued negotiation prevents finality!*—a contracting officer's *letter which leaves the door open to further negotiations, is not a final decision. Terry Industries, Inc.*, ASBCA 3730.

In order to be a decision the ruling must be final and not look to further negotiations with the contractor. *Tivo Industries, Inc.*, ASBCA No. 2411 (1956).

In *Central Slipper Co.*, (ASBCA No. 269, 1950) 4 CCF Par. 60, 858, the contractor did not appeal from the contracting officer's decision refusing an extension of time

within thirty days, but requested reconsideration and complied with requests of the contracting officer for further information concerning the cause of the delay. The Board held that such action by the contracting officer continued negotiation of the question, and prevented finality or conclusiveness of his decision.

A course of conduct by the contracting officer which leads a contractor to believe he has not received the contracting officer's final decision prevents finality. *Rose Bros.* (W.B. BCA No. 366, 1943) 1 CCF 899; *Dillard t/a J. E. Dillard & Son,* (W.D. BCA No. 74, 1943) 1 CCF 79; *Greenberg t/a Bernard Greenberg and Company,* (W.D. BCD No. 82, 1943) 1 CCF 146; *Staple Coat Corporation,* (W.D. BCA No. 93, 1943) 1 CCF 126.

In this case, the letter of 28 February 1956 is not final in form, there was continued negotiation, and the contracting officer led the plaintiff to believe it had not received his final decision on the claim. The letter of 8 August 1956 had no effect other than as an announcement that the Chicago Ordnance District refused to pass on the merits of the claim for lack of jurisdiction.

A decision of contracting agency must be the decision of the contracting officer. *John A. Johnson Contracting Corporation* v. *United States,* 132 C. Cls. 649 (1955). It follows that the letter of 8 August, 1957 from the chief, legal office, Chicago Ordnance District has no effect.

In *L. Rexor Short, Inc.,* (Navy BCA No. 249, 1947) 4 CCF Par. 60, 388, the Board held that a letter dated 24 November 1943 was not an adequate notice to appellant that the contracting officer was deciding that certain costs should be borne by appellant. He received a letter dated 12 June 1945 to that effect but from some one other than the contracting officer. The Board held that the appellant had not received a decision.

3.

**The Court of Claims Decided the Suit Was Barred As An Appeal Although No Finding Had Been Made by the Contracting Officer from Which to Appeal.**

A decision on a matter of law is not a finding.

In *Rust Engineering Co. v. United States*, (1938), 86 C. Cls. 461, this Court said: the claim "was denied by a board of officials of the Treasury Department . . . solely on the ground that a ruling of the Comptroller General, by which the board considered itself bound, prohibited the payment of these extra expenses . . . this item of plaintiff's claim was denied upon the construction of the contract rather than upon the facts . . . *The board, even if its action could be considered as a decision by the contracting officer within the meaning of the contract, made no findings of fact. There was, therefore, nothing from which an appeal was required to be taken.*"

In *Thomas Earle & Sons, Inc. v. United States*, (1944) 100 Ct. Cls. 494, 2 CCF 148, this court held that failure to take an administrative appeal from a contracting officer's decision *due to the belief of the contracting officer and the Acting Secretary of Navy that they were without authority to render decision* on claims for damages incurred as a result of delay *is not a bar to judicial prosecution.*

In *Kaiser-Ducett Company*, (N.D. BCA No. 136, 1945), 3 CCF 1146, appeals were taken from decisions of the contracting officer denying extensions of time. The government moved to dismiss the appeals since they were not taken within thirty days. The Board held since the contracting officer's decisions were not accompanied by findings of fact they were timely. In *A. C. Clothing Manufacturing Company*, (ASBCA No. 4065, 1957) 57-1 BCA par. 1321, the contracting officer denied the claim by

letter, but made no finding of fact. The Board held there had never been an appealable decision, and the dispute survived the alleged decision. In *Consolidated Diesel Electric Corporation*, (ASBCA No. 4231, 1957) 6 CCF Par. 62, 498, 57-2 BCA Par. 1446, the contracting officer refused to make a finding of fact. The government claimed that the appeal should be dismissed on the grounds that a timely appeal was not made to a letter stating that the only issue in the case was the legal liability of the contractor. The Board held that the letter did not constitute an appealable decision. In *Cobb Bros. Construction Co., Inc.*, (W.D. BCA No. 275, 1943), 1 CCF 732, it was held that since a contracting officer had not furnished the contractor with a decision on the merits of the complaint the appeal was premature. The last two cases were remanded for findings.

4.

**The Court Of Claims Held That The Suit Was Barred As An Appeal Although No Demand For Findings Was Made More Than A Year Before The Filing Of The Suit On Which The Statute Of Limitations Could Operate To Start Running On The Claim.**

Plaintiff made no demand for findings prior to 6 May 1957. On that date he made demand "to approve, reject or answer". Assuming that to be a demand for findings, no findings were made. Suit was filed on 18 January 1958. Section 13(e) of the Act, 58 Stat. 649, 661 (1944), 41 U.S.C. § 113(e) (1952) governs: Under that statute, plaintiff had the right to file suit at any time within a year after 6 May 1957 and it did so.

In *Arlington Trust Company, Inc. v. United States*, (1953), 124 C. Cls. 309, 310, the claim was first presented in 1946 to the contracting agency. The contractor made a

written demand for a final determination by the appeal board within the United States Maritime Commission on July 20, 1949. On July 25, 1949, the Commission replied that it would take no action on the claim until it had received clearance from the Attorney-General. On June 14, 1950, the plaintiff filed suit in the Court of Claims. This Court held that the claim was not barred by the Statute of Limitations. This Court said:

> "But the events which cause the limitation period to begin to run are specified in the statute. *They are either the issuance of finding, or the failure to issue finding after demand. The former event is in the control of the Government; the latter in the control of the contractor.* Here the former event did not occur, and the latter event did not occur until July 20, 1949. The plaintiff's suit was filed in time. The defendant's motion is denied." (Italics ours.)

That should settle the matter.

**5.**

**The Court Of Claims Has Held That The Claim Is Barred By Limitations Although The Administrative Agency Wrongfully Refused To Entertain The Claim And A Wrongful Refusal To Entertain A Claim By An Administrative Agency Creates A New Cause Of Action On Which Suit May Be Brought At Any Time Within Six Years.**

In *Brister & Koester Lumber Corp.* v. *U. S.*, (CA for DC, 1951) 188 F. 2d 986, 5 CCF Par. 61, 225, the court said:

> "Appellant sought recovery for extra lumber supplied on the basis of the contract price rather than the market price which the government paid. *It has been held in other cases that where a contract provides for an appeal to an administrative officer and such officer refuses to render a decision the contract is breached and the appealing party has a cause of action*

*it did not previously possess.* The right of action accrued on January 28, 1942, when it was advised that the chief of the branch would take no action pursuant to the contract. Since the action was brought within six years from that date, it was not barred by the statute of limitations."

6.

**The Court Of Claims Has Held That The Claim Is Barred By Limitations Although The Statute Was Tolled While Petitioner's Claim Was Pending Before The Contracting Agency.**

The Supreme Court of the United States has repeatedly held that one must first exhaust his administrative remedies in order to maintain a suit in court. *Gusik* v. *Schilder*, 340 U.S. 128, 131, 132. And in *United States* v. *Sing Tuck*, 194 U.S. 161, the Court held that even though Congress has not made the exhaustion of administrative remedies a condition of the right to sue in court, still, if Congress has made available an administrative remedy, one must exhaust it before he can resort to the courts.

In *Utah Power & Light Co.* v. *United States* (1929), 67 C. Cls. 602, the plaintiff sued for return of a deposit made in compliance with statute. This court said:

> "The matter must in the first instance be determined by the Secretary, but if the application is denied through error or failure on the part of the Secretary to act, the applicant may assert his right in the Court of Claims, under our general jurisdiction . . . it is not until he decides the matter that the statute of limitations begins to run."

In *William V. Griffin* v. *United States* (1948), 110 C. Cls. 330, 372, this court said:

> "There is the question as to the statute of limitations: Section 156 of the Judicial Code, U.S.C., Title

> 28, ..... Under that statute, a claim is barred unless the petition is filed 'within six years after the claim first accrues.' The time when the claim can be definitely ascertained and set up governs. *Ylagan v. United States*, 101 C. Cls. 294, 296.
>
> Since the determination of fair and reasonable compensation was confided by Congress to the Interstate Commerce Commission, the amount of the claim was not ascertainable until the Commission had given its final determination. This date was February 4, 1936, 214 I.C.C. 66. . . .
>
> The six year statute of limitations therefore began to run February 4, 1936. Since the original petition was filed February 2, 1942, the claim is within the statute. That the claim relates back to the filing of the application with the commission has been held by the Commission, and by the Supreme Court."

No decision has been rendered by a contracting officer or agency on the claim; no finding has been made by a contracting officer or agency on the claim; plaintiff has never made any demand for finding that would set the statute of limitations running, but if it did, the demand was made less than a year prior to filing the suit; the contracting agencies have refused to make any finding; that refusal is a breach of contract giving rise to a new cause of action against defendant; the statute of limitations, in any event, was tolled until the plaintiff exhausted its administrative remedies; defendant, having advised plaintiff to seek an administrative remedy and having procrastinated so long in passing upon it, is estopped to raise the statute of limitations.

## B.

### The Court of Claims Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be Settled By This Court.

The Court of Claims has declared several questions of great importance to the United States and the many contractors and subcontractors, especially the small businessmen, who are doing business with the Government the final determination as to which should be made by this Court in the interest of uniformity and good conscience on the part of the United States. Each of the questions has been decided is a manner in conflict with statutory mandate and with previous judicial and administrative decisions by the United States.

The Court of Claims has decided

A finding by a contracting officer need not be unequivocal in order to start time for appeal and limitations running on a claim.

A request from a contracting agency to a subcontractor to proceed with its contract does not establish privity of contract between the United States and the subcontractor on which claim for termination relief may be predicated notwithstanding the express provision of Section 17 that "Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without a formal contract [*with the United States*], relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, *or any other request to proceed from a contracting agency*, the contracting agency shall pay such person fair compensation therefor" (insert and emphasis ours). (Appendix "C".)

An oral statement by an officer of a contracting agency that a subcontractor has a claim against the

United States followed by investigation and appraisal does not constitute an assumption of responsibility on the part of the United States to settle the claim.

The first question has been discussed under "A" of this Section of this Petition.

The other questions are discussed below.

1.

**There Is Privity Of Contract By Reason Of The Touchstone Of A Request From The War Production To Somerset To Proceed With Its Contract.**

At the request of the War Production Board, a contracting agency, to proceed with a formal contract with B-M, a war contractor, petitioner arranged to and did furnish to B-M and to two other war contractors, Cuneo and Neloc, and to the United States, material services, and facilities, in manufacturing .30 caliber bullet cores, related to prosecution of the war, without a formal contract with the United States or the War Production Board or Cuneo or Neloc, and, perhaps, with B-M relying in good faith upon the apparent authority of the contracting agency to guarantee payment by B-M and that everything would be all right.

This created privity of contract between plaintiff and defendant because " a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise" (Restatement, Contracts, Sec. 90; Corbin On Contracts, Arthur Linton Corbin, One Volume Edition, West Publishing Company 1952, p. 281), and "A promise is an expression of intention that the promisor will con-

duct himself in a specified way or bring about a specified result in the future, communicated in such manner to a promisee that he may justly expect performance and reasonably rely thereon" (Corbin On Contracts, Arthur Linton Corbin, One Volume Edition, West Publishing Company 1952, pp. 20-21).

Accordingly upon cancellation of the contract and inability of B-M to meet its obligations, equity and good conscience required fair compensation to be paid plaintiff for .30 caliber pallet cores on hand and in process at the time of termination. The Government cannot be held liable without its consent, of course, even under such circumstances, but Congress has given that consent in Section 17 of the Contract Settlement Act of 1944 which requires defendant to pay such compensation to a subcontractor for the material, services, and facilities, if authority to make the request to proceed was present, and to make a fair settlement with the subcontractor of the obligation created or incurred, whether expressed or implied, in fact or in law, or in the nature of an implied or quasi-contract, if authority was lacking, and without regard to whether a contracting agency has or has not delivered to the subcontractor and the contractors liable to it "written notice stating its acceptance of responsibility for settling his claim and the conditions applicable thereto", which only applies when no contracting agency has requested the subcontractor to proceed with its contract, even though such compensation has already been included and paid as part of a settlement with another contractor and which it is obligated to pay without regard to that Act.

2.

**The Chicago Ordnance District Did Assume The Obligation To Settle Somerset's Claim.**

The Chicago Ordnance District, a contracting agency, did assume the obligation to settle Somerset's claim, when the district sent its termination team to New York in December 1944. Petitioner stated in its Petition For Rehearing in The Court of Claims that:

> "The Major in charge of that team advised Neloc and B.M. that they had no termination claim, that Somerset did, and gave us instructions for the filing of claim with proper parties, which we did."

That meeting was held on December 20, 1944. A letter from Major Parsons dated May 23, 1945 and a letter from Captain Norwood dated May 24, 1945, support the statement quoted in that in the first letter Chicago Ordnance requests New York Ordnance to handle the claim thus indicating it had previously assumed the obligation to handle it and in the second letter New York Ordnance advises Somerset that Chicago Ordnance will handle it thus indicating that Chicago Ordnance in the opinion of New York Ordnance had assumed the obligation to do so and it was letting the obligation remain where it lay. The Petition states: "Chicago Ordnance Termination Officers traveled to New York for the express purpose of concluding the termination claim under the Government "Stop Work Order". This termination team delegated the New York Ordnance District to negotiate Somerset's termination claim." There was no reason for delegating New York Ordnance District to negotiate the claim unless it intended to settle the claim.

3.

**The New York Ordnance District Did Assume The Obligation To Settle Somerset's Claim.**

Everett J. Canning further states: "The Government further assumed the obligation when N. Y. Ordnance investigated and audited the claim." The New York Ordnance through Mr. Van Heest and others verified inventories, machines and made audits at the factory of Somerset and were prepared to negotiate the settlement but were prevented from doing so or refused to do so without written authorization from Chicago. There was no occasion for the Government to make such investigation and audit unless it intended to settle the claim.

## STATEMENT OF THE CASE.

The petitioner, Somerset Machine & Tool Company, a co-partnership of James H. Canning, Everett J. Canning and Doris Canning, in 1942 was doing business at 246 East Second Street, Plainfield, New Jersey.

In 1942 they were equipped to manufacture .30 caliber steel bullet cores. They had finished one job to the satisfaction of the War Production Board. The War Production Board advised them that Neloc Corporation had a subcontract with Cuneo Press, Inc., the prime contractor, with the Government for making .30 caliber bullet cores. The contract of Cuneo to Neloc was for the production of 72,000,000 bullet cores. The War Production Board recommended that Somerset accept a subcontract from Neloc and a contract was signed on December 14, 1942.

Before starting production Somerset, however, investigated Neloc and found it was financially worthless and did not have a plant equipped to produce bullet cores.

As a result, Somerset refused to perform its contract.

The War Production Board requested Somerset to manufacture the cores by representing that the Government stood behind the subcontract chain. Somerset then agreed to accept a subcontract from B-M Machine Works.

Upon investigation, however, it was discovered that it had no machine shop equipment to manufacture bullet cores. The War Production Board representatives induced Somerset to enter into a contract with that company by stating that everything would be all right and by getting a guarantor.

The contract called for the production of 40,000,000 bullet cores. Somerset produced 20,777,800 bullet cores or over 50% of the contract by the spring of 1944. It stopped shipping when ordered to do so on June 29, 1944. Its termination was never paid to Somerset or anyone else.

The facts to this point are well summarized at page 2 of the Petition filed in the Court of Claims: "The War Production Board sought out Somerset to manufacture the bullet cores under the Cuneo contract; Cuneo had sublet its contract and the only way Somerset could fulfill the requests of the War Production Board was to come in under two irresponsible sub-contractors, and did so under the assurance of the agents of the War Production Board that the Government would see that Somerset was compensated."

Plaintiff requested assistance in submitting its claim to the New York Ordnance District on 21 August 1944. On 26 August 1944 New York Ordnance advised plaintiff that plaintiff's letter had been referred to the Chicago Ordnance District for action. On 9 September 1944 Chicago Ordnance District requested more information stating: "After the requested information has been received, this office will be in a position to determine whether or not the Government will be able to handle the cancellation of your order as a termination under the Contract Settlement Act of 1944." The information was furnished on September 30, 1944.

Chicago Ordnance District sent a termination team to New York on December 29, 1944 and told Somerset that it had a termination claim and advised Somerset to file it with Chicago Ordnance.

On 15 March 1945 Somerset filed its claim for $12,199.69 with Chicago Ordnance on a standard contract settlement proposal form. New York Ordnance inspected and audited the claim.

Letters of inquiry were written on 3 May 1945 and 17 May 1945. Chicago Ordnance District answered on 23 May 1945: "We believe you should process your claim through your immediate customer, the B-M Machine Works. Should you fail to secure a satisfactory handling of your claim in this matter, it is suggested that you present to the New York Ordnance District a detailed statement of all pertinent facts showing your efforts to effect a settlement through the contractual chain and the reasons of your inability to effect such a settlement in a satisfactory manner. Upon submission of such statement, the New York Ordnance District will then be in a position to determine what course of action is desirable and whether any action under the Contract Settlement Act (particularly Section 7(f) thereof) is advisable and warranted. Without such a statement, a determination of proper alternative action is impossible. A copy of this letter is being forwarded to the New York Ordnance District in order that they may be fully advised of the developments in connection with your claim."

On 28 May 1945 inquiry was made of New York Ordnance District. That District answered 30 May 1945 stating: "Just prior to receipt of your letter, this office forwarded to the Chicago Ordnance District office a complete report with respect to actions taken by Somerset Machine & Tool Co. and our discussions with that company and with you [Henry W. Clement]. It is felt that such report will assist the contracting officer in determining the action to be taken. It is the belief of this office that the Chicago Ordnance District office will give

this matter their prompt and earnest consideration." On 2 January 1946 Chicago Ordnance District requested information of New York Ordnance District. On 24 October 1945 Cuneo recommended plaintiff file its claim with the Appeal Board of the Office of Contract Settlement. This was done on January 12, 1950. On 30 January 1956 plaintiff's attorney wrote Cuneo for a statement that Cuneo was not paid for plaintiff's termination claim, with a copy to Chicago Ordnance District and Washington. It was given.

On 20 February 1956 he wrote the contracting officer at Chicago Ordnance District "Will you please be so kind as to let me know if I may have conference with you in Chicago, because Washington informed me that you have authority to dispose of this matter."

On 28 February 1956 the latter answered giving his opinion that the judgment of 8 July 1955 in *Neloc Corporation* v. *Cuneo Press, Inc.*, 47 C 1332, U.S.D.C. N.D. Ill. was "*res adjudicata* in its holding that the contract between Neloc Corporation and The Cuneo Press, Inc. was a terminated contract which had been finally settled at or before the effective date of the Contract Settlement Act of 1944, and that, therefore, the provisions of the Contract Settlement Act of 1944 were not applicable, and that the Plaintiff, Neloc Corporation, had no claim against the Defendant by reason of any provision of that Act," and "effectually destroyed the contractual chain which would have permitted second and third tier subcontractors to have their claims processed in the manner provided in the Regulations and Procedures implementing the Contract Settlement Act of 1944." After stating this legal conclusion, he added: "Under the circumstances, it appears that no useful purpose could be served by a con-

ference to discuss your client's alleged claim. However, if you still desire a conference after examination of the views expressed herein, such can be arranged."

On 22 March 1956 plaintiff's attorney wrote a three-page letter in answer to the letter last cited arguing the matter, and concluding "it is respectfully requested that a conference may be had." On 5 April 1956 the Contracting Officer replied: "Your request for a conference to further discuss the subject matter of your client's alleged claim is granted and it may be held in this office on 12 April 1956 at 2:30 p.m."

On 6 May 1957, plaintiff's attorney wrote:

> "It is our plan to proceed before the Court of Claims or by a Federal suit but because our administrative remedies have not been exhausted, we probably would encounter this technical defense. Would you please, therefore, either approve, reject or answer the petition so that we may proceed with our claim before the proper authority . . . at the conference in your office, I was informed that your office did not believe it had authority to settle, although Washington implied you did. Since that time our efforts to get a statement from Washington that you had authority have been unavailing, and of course we are not in a position to request that authority, but we have tried."

On June 26, 1957, he wrote again stating:

> "Would you be so kind as to notify me . . . whether or not the settlement proposed submitted to your office on September 11, 1950, has been approved or rejected. No communication from your office has been received and until such is done we cannot go before your Appeal Board or the Court of Claims. . . . a response surely is in order. This is particularly true since the Contracting Agency is required to embody its determination of the amount due to the contractor in written findings."

On 8 August 1957, the Chief, Legal Office, Chicago Ordnance District, not the Contracting Officer answered:

> "Receipt of your letters of 6 May 1957 and 26 June 1957 is acknowledged. . . . The referenced letter of 28 February 1956 constituted a ruling on the termination claim of your client. This opinion was concurred in by Office of the Chief of Ordnance and Deputy Chief of Staff for Logistics."

Subsequently "B-M" went into bankruptcy.

On January 21, 1958, petitioner filed its petition for review in the Court of Claims. The jurisdiction of the Court of Claims was invoked under 41 U.S.C. §§ 117(c) and 113(b) and under 28 U.S.C. §§ 1491 and 1494.

The sole question presented to the Court of Claims was whether under the facts presented the petitioner had a cause of action against the United States. The United States filed a motion to dismiss on the ground the claim was barred by limitations on the right to appeal and the general six year statute of limitations on claims against the United States. Issue was joined and oral argument had on the motion to dismiss. The court rendered an opinion deciding the case on the merits and granting the motion to dismiss. A petition for rehearing going to the merits of the case was denied on April 8, 1959, as previously stated.

## CONCLUSION.

Wherefore petitioner prays that a writ of certiorari issue to the United States Court of Claims.

Respectfully submitted.

HUGH M. MATCHETT
*Attorney for Petitioner*

DONALD P. MCFADYEN
Of Counsel

## APPENDIX "A".

In the United States Court of Claims

No. 27-58

(Decided January 14, 1959)

SOMERSET MACHINE & TOOL COMPANY, A CO-PARTNERSHIP CONSISTING OF EVERETT J. CANNING, J. H. CANNING AND DORIS CANNING, v. THE UNITED STATES

*Mr. Hugh M. Matchett* for plaintiffs. *Mr. Donald P. McFadyen*, was on the brief.

*Mr. Earl E. Huntington*, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for defendant.

On Defendant's Motion To Dismiss

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before the court on defendant's motion to dismiss plaintiff's petition on the ground that it is barred by the statute of limitations.

Plaintiff is a sub-sub-subcontractor under a prime contract entered into between the defendant and the Cuneo Press, Incorporated. Plaintiff's contract was with the B-M Machine Works, which itself was a sub-subcontractor. This company notified plaintiff on June 23, 1944, that the prime contractor would not accept further shipments after June 29, 1944.

Thereafter, plaintiff filed termination claims with the B-M Machine Works and with the Neloc Corporation, the subcontractor, and with Cuneo Press, the prime contractor, and with the New York Ordnance District and

Chicago Ordnance District. So far as the petition discloses, no action was taken on its claim until after plaintiff filed a so-called "Settlement Proposal" on September 11, 1950.

Plaintiff wrote the contracting officer a number of times seeking action on its proposal. Finally on February 28, 1956, the contracting officer at the Chicago Ordnance District notified plaintiff's attorney that its claim for payment was denied. This was followed by another letter on August 8, 1957, to plaintiff's attorney advising it that the former letter of February 28, 1956, "constituted a ruling on the termination claim of your client." Plaintiff's petition was filed in this court on January 21, 1958.

A subcontractor, of course, has no right of action against the Government due to lack of privity of contract. However, section 7 of the Contract Settlement Act of 1944 (58 Stat. 649, 655) permits a contracting agency to "settle directly termination claims of subcontractors to the extent that it deems such action necessary or desirable for the expeditious and equitable settlement of such claims." Only if the contracting agency assumes the obligation to settle a subcontractor's claim can the subcontractor maintain a suit against the United States. *Erie Basin Metal Products Co.* v. *United States*, 123 Ct. Cls. 433. It appears from the petition that the agency did not do so.

Thus the petition fails to state a cause of action.

The defendant's defense, however, is that plaintiff's claim, if any, is barred by the statute of limitations. It is clear that it is barred. So far as the petition shows, the first action taken on plaintiff's claim was the letter of February 28, 1956, from the contracting officer at the Chicago Ordnance District, denying the claim. Section 13

(b) of the Contract Settlement Act, *supra*, permits a contractor, aggrieved by the action of the contracting agency, to bring suit in this court; but by subsection (c) he is required to do so within 90 days from the date of delivery to him of the findings of the contracting officer. Plaintiff's claim was denied on February 28, 1956. It did not file suit until January 21, 1958. It is clearly barred.

As stated, the Contract Settlement Act does not require the contracting agency to settle directly with the subcontractor; it merely permits it to do so, but even if there was a requirement on the contracting agency to do so, nevertheless, plaintiff brought its action in this court long after the time within which it was permitted to do so under section 13 (c) of the Act.

Defendant's motion is granted, and plaintiff's petition will be dismissed.

It is so ordered.

REED, *Justice* (Ret.), sitting by designation; LARAMORE, *Judge*, MADDEN, *Judge*, and JONES, *Chief Judge*, concur.

## APPENDIX "B"

Copy 1.

DEPARTMENT OF THE ARMY
CHICAGO ORDNANCE DISTRICT,
209 West Jackson Boulevard
Chicago 6, Illinois

SMarks:o
28 February, 1956

Address reply to
District Chief
And refer to
ORDEC-LM

Mr. Donald P. McFadyen
Suite 1455, First National Bank Building
Chicago 3, Illinois
Dear Mr. McFadyen:

Re contract No. W-271-ORD-1614
The Cuneo Press, Inc., Prime Contractor

This letter acknowledges receipt of your letters of 30 January and 20 February 1956 concerning alleged termination claim of your client, Somerset Machine & Tool Co., in connection with captioned World War II contract.

So that you may understand the basis for any termination claim which your client could possibly have arising out of its contract with B-M Machine Works, we believe it pertinent to restate the contractual chain created when The Cuneo Press, as prime contractor under Contract No. W-271-ORD-1614, entered into a subcontract with Neloc Corporation to produce some of the Bullet Cores which were the subject matter of said World War II contract. Your client was at no time a subcontractor of The

Cuneo Press, Inc., Xeloc Corporation entered into a subcontract with B-M Machine Works and the latter entered into the contract with your client.

Other than its Common Law Right of Action against the B-M Machine Works for any damages it may have sustained by reason of a breach of its contract by B-M Machine Works, any rights that your client could possibly have for the payment of its alleged termination costs would have to be through the contractual chain, pursuant to the Contract Settlement Act of 1944 and the Regulations and Procedures promulgated to implement said Act.

The claim of Xeloc Corporation against the Cuneo Press, Inc., involving alleged termination costs was tried before Judge Hoffman in the District Court of the United States for the Northern District of Illinois, Eastern Division (Case No. 49 C 1332). At the conclusion of the trial, Judge Hoffman requested each side to submit Findings of Fact and Conclusions of Law submitted by the Defendant, The Cuneo Press, Inc., were adopted in toto and included in the Court's decision and the judgment entered thereon on July 8, 1955. After the 17th Conclusion of Law the judgment provides "it is ordered, therefor, that the Plaintiff have or take nothing by virtue of its suit against the Defendant, and that the Plaintiff go hence without day and that the Defendant have judgment against the Plaintiff for its costs". Conclusion of Law 3, as set forth in the judgment, provided as follows: "Said contract between the Plaintiff and the Defendant was a terminated war contract which had been finally settled at or before the effective date of the Contract Settlement Act of 1944, therefore, the provisions of the Contract Settlement Act of 1944 are not applicable and the Plaintiff has no claim against the Defendant by reason of any provisions of said Act."

The legal effect of such Conclusion of Law, as embodied in the judgment, effectually destroyed the contractual chain which would have permitted second and third tier subcontractors to have their claims processed in the manner provided in the Regulations and Procedures implementing the Contract Settlement Act of 1944.

Neloc Corporation filed an appeal from said judgment but did not persist in such appeal, and its time to perfect such appeal has long since expired. The judgment in the Neloc Corporation case is res adjudicata in its holding that the contract between Neloc Corporation and The Cuneo Press, Inc., was a terminated contract which had been finally settled at or before the effective date of the Contract Settlement Act of 1944, and that, therefore, the provisions of the Contract Settlement Act of 1944 were not applicable, and that the Plaintiff, Neloc Corporation, had no claim against the Defendant by reason of any provision of said Act.

Under the circumstances, it appears that no useful purpose could be served by a conference to discuss your client's alleged claim. However, if you still desire a conference after examination of the views expressed herein, such can be afranged.

It is extremely unfortunate that your client was unable to obtain financial redress from B-M Machine Works because of the latter's insolvency.

Sincerely yours,

(signed) W. P. Maas

Contracting Officer.

2.

DEPARTMENT OF THE ARMY
CHICAGO ORDNANCE DISTRICT
209 West Jackson Boulevard
Chicago 6, Illinois

Address reply to
Commanding Officer
and refer to:
ORDEC-LS

8 August 1957

Donald P. McFadyen
Attorney at Law
1455 First National Bank Bldg.
33 South Clark Street
Chicago 3, Illinois

Dear Mr. McFadyen:

Re: Contract No. W-271-ORD-1614
The Cuneo Press, Inc., Prime Contractor

Receipt of your letters of 6 May 1957 and 26 June 1957 is acknowledged.

The information you request was provided in a letter from the Contracting Officer under date of 28 February 1956, wherein among other things, it was pointed out that in the case of Neloc vs. Cuneo, District Court of the United States, Northern District of Illinois, Eastern Division, Case No. 49C1332, in which judgment was entered 8 July 1955, one of the Conclusions of Law set forth by the Court in its decision provided that the contract between the plaintiff and the defendant was a terminated war contract which had been settled at or before the effective date of the Contract Settlement Act, and therefore, the provisions of the Contract Settlement Act of 1944 were not applicable.

It was pointed out to you that the legal effect of such Conclusion of Law destroyed the contractual chain which would have permitted second and third tier subcontractors to have their claims processed in the manner provided in the Regulations and Procedures implementing the Contract Settlement Act of 1944.

The referenced letter of 28 February 1956 constituted a ruling on the termination claim of your client. This opinion was concurred in by Office of the Chief of Ordnance and Deputy Chief of Staff for Logistics.

Sincerely yours,
(signed) Harvey H. Talcott
Chief, Legal Office

## APPENDIX "C"

The Contract Settlement Act of 1944, 58 Stat. 649 (1944), 41 U.S.C. § 103, 106, 107, 113, 117, 120, 124, (1952) provides in pertinent part:

Section 3

(a) The term "prime contract" means any contract, agreement, or purchase order, heretofore or hereafter entered into by a contracting agency and connected with or related to the prosecution of the war; and the term "prime contractor" means any holder of one or more prime contracts.

(b) The term "subcontract" means any contract, agreement, or purchase order heretofore or hereafter entered into to perform any work, or to make or furnish any material to the extent that such work or material is required for the performance of any one or more prime contracts or of any one or more other subcontracts; and the term "subcontractor" means any holder of one or more subcontracts.

"(c) The term 'war contract' means a prime contract or a subcontract; and the term 'war contractor' means any holder of one or more war contracts."

"(g) The term 'contracting agency' means any Governmental agency which has been or hereafter may be authorized to make contracts pursuant to section 201 of the First War Powers Act, 1941, and includes . . . the Smaller War Plants Corporation, and the War Production Board."

Section 6

"(a) It is the policy of the Government, and it shall be the responsibility of the contracting agencies and the Director, to provide war contractors with speedy and fair compensation for the termination of any war contract, in accordance with and subject to the provisions of this Act, giving priority to contractors whose facilities are privately owned or privately operated. Such fair compensation for the ter-

mination of subcontracts shall be based on the same principles as compensation for the termination of prime contracts."

Section 7

"(b) Whenever any contracting agency is satisfied of the inability of a war contractor to meet his obligations it shall exercise supervision or control over payments to the war contractor on account of termination claims of subcontractors of such war contractor to such extent and in such manner as it deems necessary or desirable for the purpose of assuring the receipt of the benefit of such payments by the subcontractors."

Section 13

"(b) Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may * * * (2) bring suit against the United States for such claim or such part thereof, in the Court of Claims * * *."

"(c) Any proceeding under subsection (b) of this section shall be governed by the following conditions:

* * *

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the findings by the contracting agency, or (ii) in case of protests or appeal within the agency, within ninety days after the termination of such protest or appeal, or (iii) in case of failure to deliver such findings within one year after his demand therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in accordance with subsection (b) of this section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim."

(d). Any contracting agency may settle directly termination claims of subcontractors to the extent that it deems such action necessary or desirable for the expeditious and equitable settlement of such claims. In making such termination settlements any contracting agency may discharge the claim of the subcontractor by payment or may purchase such claim, and may agree to assume, or indemnify the subcontractor against, any claims by any person in connection with such claim or the termination settlement. Any contracting agency undertaking to settle the termination claim of any subcontractor shall deliver to the subcontractor and the war contractor liable to him written notice stating its acceptance of responsibility for settling his claim and the conditions applicable thereto, which may include the release or assignment to the contracting agency, of his claims against the war contractor liable to him; upon consent thereto by the subcontractor, the Government shall become liable for the settlement of his claims upon the conditions specified in the notice.

* * * *

(f) If any contracting agency determines that in the circumstances of a particular case equity and good conscience require fair compensation for the termination of a war contract to be paid to a subcontractor who has been deprived of and cannot otherwise reasonably secure such fair compensation, the contracting agency concerned may pay such compensation to him although such compensation already has been included and paid as part of a settlement with another war contractor."

Section 17

"(a) Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without a formal contract, relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to

proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor."

"(b) Whenever any formal or technical defect or omission in any prime contract, or in any grant of authority to an officer or agent of a contracting agency who ordered any materials, services, and facilities might invalidate the contract or commitment, the contracting agency (1) shall not take advantage of such defect or omission; (2) shall amend, confirm, or ratify such contract or commitment without consideration in order to cure such defect or omissions; and (3) shall make a fair settlement of any obligation thereby created or incurred by such agency, whether expressed or implied, in fact or in law, or in the nature of an implied or quasi contract."

"(c) Where a contracting agency fails to settle by agreement any claim asserted under this section, the dispute shall be subject to the provisions of section 13 of this Act."

"(d) The Director shall require each contracting agency to formalize all such obligations and commitments within such period as the Director deems appropriate."

Section 20

"(f) Any contracting agency may authorize or direct its officers and employees, as a part of their official duties, to advise, aid, and assist war contractors in preparing and presenting termination claims, in obtaining interim financing, and in related matters, to such extent as it deems desirable. . . ."

Section 24

"(a) This Act shall become effective twenty days after the date of its enactment. With the exception of the provisions of paragraphs (b), (c), (d) and (e), of section 12, and of sections 6, 7, 8, 9, 10, and 13, this Act shall be applicable in the case of any terminated war contract which has been finally settled at or before the effective date of this Act."